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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. [redacted]

RICHMOND UNIFIED SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

SONJA LYNN BERG, Individually and On Behalf of All Other Female Employees of the Richmond Unified School District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, AMICUS CURIAE

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MOTION OF NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Education Association (NEA) hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amicus curiae,* in support of the position of the respondent. Respondent has consented to the filing of this brief, but petitioner has denied such consent.

NEA, organized in 1857 and chartered by special act of Congress in 1906, is the nation's oldest and largest organization of professional educators. It is also the largest organization of public employees in the nation, with more than 1.5 million members. NEA's purposes, as set forth in its Charter, are "to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States."

NEA is strongly committed to the eradication of all forms of discrimination on the basis of race, sex, or other arbitrary classifications, particularly in the field of public education. It has frequently filed briefs as *amicus curiae* in this Court in cases involving issues of discrimination or other matters of particular concern to NEA's membership.

NEA's interest in this particular caes is two-fold. First, the basic substantive[1] question presented in this case—namely, whether Title VII of the Civil Rights Act of 1964, as amended, requires an employer to treat pregnancy the same as other forms of disability for purposes of disability leave and salary continuation—is a recurring one, which affects a large percentage of teachers throughout the country. Second, the case will require the Court to interpret and apply its recent decision in *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976). There has been considerable confusion and debate as to whether that case modified certain basic legal principles which had heretofore been developed

[1] This case also presents several procedural and jurisdictional issues. While NEA also has an interest in these issues, it does not believe it can contribute anything to the arguments concerning them which will be made by respondent. Accordingly, our brief is limited only to the substantive issues in this case.

under Title VII of the Civil Rights Act of 1964, or whether it merely applied those principles to the particular facts of that case. The Court's interpretation of *Gilbert* in this case could affect not only future cases involving issues relating to the rights of pregnant employees, but many other types of cases under Title VII as well.

The briefs and arguments of the parties will necessarily concentrate on the specific facts and issues in this particular case. NEA's brief, on the other hand, concerns itself primarily with the broader legal issues, particularly the meaning of the *Gilbert* case. Thus, we will not deal with the issue of whether the employment policies involved in this case were purposefully discriminatory, since that issue will be fully briefed by respondent. Our concern, rather, will be to show that those policies, whatever their intent, had a discriminatory effect, and that *Gilbert* did not alter the established principle that employment policies which have such an effect are prohibited by Title VII unless they are shown to serve some business necessity. We believe that our analysis of these issues is somewhat different than respondent's, and will be of assistance to the Court.

Respectfully submitted,

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INDEX

Page

MOTION OF NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE 1

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, AMICUS CURIAE 1

INTRODUCTION 1

ARGUMENT 4

I. THE DECISION IN GENERAL ELECTRIC CO. v. GILBERT DID NOT ALTER THE ESTABLISHED RULE THAT AN EMPLOYMENT PRACTICE WHICH HAS AN ADVERSE EFFECT ON WOMEN OR MINORITIES CONSTITUTES A PRIMA FACIE VIOLATION OF TITLE VII 4

II. THE EMPLOYMENT POLICIES AT ISSUE IN THIS CASE, UNLIKE THE INSURANCE SCHEME INVOLVED IN GILBERT, HAD A DISPARATE ADVERSE IMPACT ON WOMEN, AND SINCE THEY WERE NOT REQUIRED BY ANY BUSINESS NECESSITY THEY VIOLATED TITLE VII .. 10

A. The Maternity Leave Policy 11

B. The Paid Sick Leave Policy 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) .. 9
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 14
Communication Workers v. American Tel. and Tel. Co., 513 F.2d 1024 (2d Cir. 1975), *judgment vacated*, 97 S. Ct. 724 (1977) 2
Cook v. Hudson, 97 S. Ct. 543 (1976) 3
Frontiero v. Richardson, 411 U.S. 677 (1973) 15-16
Geduldig v. Aiello, 417 U.S. 484 (1974) 5-6
General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976) . 2-10
Green v. Missouri Pacific R.R., 523 F.2d 1290 (8th Cir. 1975) 9
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 6-8

1. Is it violative of Title VII for an employer to require a pregnant female employee to take leave from her job at a time when her own physician certifies that she is able to continue working, if no similar requirement is imposed on employees with other medical conditions?

2. Is it violative of Title VII for an employer to refuse to permit an employee on maternity leave to draw accrued sick pay, when such pay is made available in the case of all other forms of disability?[1]

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[1] While these issues are within the scope of the grant of certiorari in this case, we note that the Court has declined to give plenary consideration to other recent cases involving similar pregnancy and maternity issues, but instead has vacated the judgments below and remanded for further consideration in light of *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976). See *Communications Workers* v. *American Tel. and Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975), *judgment vacated*, 97 S.Ct. 724 (1977); *Hutchinson* v. *Lake Oswego School District No. 7*, 519 F.2d 961 (8th Cir. 1975), *judgment vacated*, 97 S.Ct. 725 (1977); *Social Service Employees Union* v. *Women in City Government United*, —— F.2d —— (2d Cir. 1976), *judgment vacated*, 97 S.Ct. 724 (1977). Accordingly, it appears that the Court may have granted certiorari in this case chiefly to examine the procedural issues which the case also presents. In such event the Court may wish to take account of the fact that effective January 1, 1976—*i.e.*, after the decision of the Court of Appeals in this case—Section 13456 of the California Education Code was amended to prohibit petitioner School District, as well as other California school districts, from engaging in the practices out of which this case arose, by providing:

> "The governing board of any school district shall provide for leave of absence from duty for any certificated employee of the district who is required to be absent from duties because of pregnancy, miscarriage, childbirth, and recovery therefrom. The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician.
>
> Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment by any school district."
>
> • • •

Under these circumstances we believe the Court would be warranted in dismissing its writ as improvidently granted insofar as these substantive issues are concerned, as it has done on prior occasions when laws or regulations adopted subsequent to the conduct giving rise to litigation have settled the issue involved for the future. See, e.g., *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *Quinn* v. *Muscare*, 425 U.S. 560 (1976); *Cook* v. *Hudson*, 97 S.Ct. 543 (1976).

Petitioners' basic position is that these issues are controlled by the Court's decision in *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976). They construe that case as broadly holding that Title VII does not prohibit an employer from treating pregnancy differently from other forms of disability for *any* purpose, including involuntary leave or eligibility for accumulated sick pay.

We disagree with petitioners' interpretation of *Gilbert*, and the main purpose of this brief is to demonstrate that their interpretation is erroneous. To do so, we shall first demonstrate that *Gilbert* did not change the basic standards which govern under Title VII, but merely applied them to the particular facts involved in that case. We shall then show that the facts of this case are significantly different from *Gilbert*, and that under controlling principles which were reaffirmed in *Gilbert*, a different result is required here.

ARGUMENT

I.

THE DECISION IN GENERAL ELECTRIC CO. v. GILBERT DID NOT ALTER THE ESTABLISHED RULE THAT AN EMPLOYMENT PRACTICE WHICH HAS AN ADVERSE EFFECT ON WOMEN OR MINORITIES CONSTITUTES A PRIMA FACIE VIOLATION OF TITLE VII

In *General Electric Co.* v. *Gilbert, supra,* the Court was concerned with a disability insurance plan, under which employees who became totally disabled as a result of nonoccupational sickness or accident received a weekly benefit equal to 66⅔ percent of their normal straight-time earnings. The issue before the Court was whether the exclusion of pregnancy-related disability from coverage under this plan violated Section 703 (a)(1) of the Civil Rights Act of 1964, which makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1).

As described by the Court, the employer's plan was "nothing more than an insurance package, which covers some risks, but excludes others" (97 S.Ct. at 409). The Court concluded that the plan did not discriminate against women since it provided precisely the same benefits to both sexes, and the cost of providing those benefits was actually higher for women than for men. Thus, the Court explained:

> "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive. For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the even-handed *inclusion* of risks." 97 S.Ct. at 409-10 (emphasis in original; footnote omitted).

The Court was also guided by its earlier decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). Although *Geduldig* arose under the Equal Protection Clause of the Fourteenth Amendment, the Court in *Gilbert* found the concepts of discrimination evolved under that Clause to be "a useful starting point" in interpreting the language of Section 703(a)(1)—particularly since the term "discriminate," as used in that Section, is not defined in Title VII itself (97 S.Ct. at 406-07). *Geduldig,* as the *Gilbert* opinion stated, involved a "strikingly similar disability plan" (*id.* at 407), administered by the State of California, and funded entirely from contributions deducted from the wages of participating employees. The plan provided benefits based on amount of prior earnings, with periods of payment and types of coverage—including the exclusion of pregnancy-related disabilities—very much like the General Electric plan. Pointing out that "a totally comprehensive program would be substantially more costly than the present program," and would require increased employee contributions or reductions in other coverage (417 U.S. at 495-96), the Court concluded in *Geduldig* that the pregnancy exclusion was not invalid because the "fiscal and actuarial benefits of the program . . . accrue to members of both sexes" and there was no showing that the financial benefits of the

plan "worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program" (417 U.S. at 497 & n.20).

The key element in both *Gilbert* and *Geduldig* was the Court's conclusion that despite the exclusion of pregnancy, the overall insurance scheme in each case did afford parity of benefits to men and women. There is thus no warrant for assuming—as petitioners do in the instant case—that the results in those two cases must control in factually different situations, merely because the claimed violation arises out of the employer's practices with respect to pregnancy or maternity. *Gilbert*, after all, neither overrules nor questions this Court's first Title VII decision—*Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971)—in which an employer's refusal to employ mothers of pre-school age children was held to constitute a prima facie violation of the Act.

Moreover, the Court's opinion, read together with the two concurring opinions, makes clear that a different result would be required if it is shown that the employer's practices with respect to pregnancy or maternity have a discriminatory *effect*. While the Court indicated that a discriminatory *purpose* may be required to establish a violation of Section 703(a)(1) of the Act, it recognized that a showing of discriminatory *effect* is sufficient under Section 703(a)(2), under principles established in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).[2] Thus, the Court stated:

[2] Mr. Justice Brennan's dissenting opinion in *Gilbert* cited "unexplained and inexplicable implications" in the Court's opinion that he viewed as inconsistent with the holding in *Griggs* that a prima facie violation of Title VII is established by demonstrating that a facially neutral classification has the effect of discriminating against members of a defined class (see 97 S.Ct. at 417). However, the only such "implications" in the Court's opinion were with reference to Section 703(a)(1), the provision under which *Gilbert* arose. The Court's statements concerning Section 703(a)(2)—discussed in the text, *supra*—make clear that the *Griggs* principle would still be applicable under that section. Moreover, two of the six members of the Court who concurred in the Court's opinion—as well as the three dissenters—all disassociated themselves from any implication that a showing of discriminatory intent is required to establish a violation of Title VII, or that the decision in *Griggs* v. *Duke Power Co.* is no longer good law. See 97 S.Ct. at 413 (concurring opinions of Mr. Justice Stewart and Mr. Justice Blackmun); *id.* at 417 (dissenting opinion of Mr. Justice Brennan and Mrs. Justice Marshall); *id.* at 420-21 (dissenting opinion of Mr. Justice Stevens).

> "[O]ur cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. See *Washington* v. *Davis*, —— U.S. ——, ——, 96 S.Ct. 2040, 2050, 48 L.Ed.2d 597 (1976). For example, in the context of a challenge, under the provisions of § 703(a)(2), to a facially neutral employment test, this Court held that a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were 'invidiously to discriminate on the basis of racial or other impermissible classification,' *Griggs* v. *Duke Power Co.*, . . ." 97 S.Ct. at 408 (emphasis in original; footnotes omitted).

The Court's opinion—together with the emphatic statements of two of the six concurring justices that their concurrences were premised on the lack of proof of discriminatory effect in that particular case—reaffirms the continuing validity of the "discriminatory

effect" test applied under Section 703(a)(2), the language of which does not include the word "discriminate," but rather forbids an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2).

That this provision does not require proof of discriminatory intent was made clear in *Griggs,* where this Court recognized that if "absence of discriminatory intent" was controlling, a variety of employment practices would continue to "operate as 'built-in headwinds' for [protected] groups." 401 U.S. at 432. It accordingly concluded:

> "The Act proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [a protected class] cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.

After noting the lack of any proof of discriminatory intent on the part of the employer in that case, the Court emphasized:

> "But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432 (emphasis in original).

These principles have become of utmost importance to the meaningful implementation of Title VII, and have since been applied not only by this Court, but in numerous decisions of the lower courts, to invalidate testing practices, seniority and transfer restrictions, and other employment policies which, while facially neutral, nonetheless had the effect of disadvantaging groups which Title VII was intended to protect. *See, e.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), *Robinson* v. *Lorillard Corp.,* 444 F.2d 791 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971); *United States* v. *Chesapeake & Ohio Ry.,* 471 F.2d 582 (4th Cir. 1972), *cert. denied,* 411 U.S. 939 (1973); *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971); *Green* v. *Missouri Pacific R.R.,* 523 F.2d 1290 (8th Cir. 1975); *Rowe* v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972); *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974); *United States* v. *St. Louis-San Francisco Ry.,* 464 F.2d 301 (8th Cir. 1972), *cert. denied,* 409 U.S. 1116 (1973).

Once it is established that an employer's practice has a disproportionate impact upon protected groups, *Griggs* makes clear that the burden shifts to the employer to show that the practice is required by "business necessity." And the lower courts have repeatedly emphasized that an employer does not meet this burden merely by showing that the practice is designed to serve some nondiscriminatory business purpose. The rule must be "essential" to its stated goal. "[I]f the legitimate ends . . . can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued"

United States v. *Bethlehem Steel Corp., supra,* 446 F.2d at 662. See also *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 796-97; *United States* v. *St. Louis-San Francisco Ry., supra,* 464 F.2d at 308.

The *Gilbert* decision did not question any of these principles. Rather, as noted above, the result in that case was based on the Court's conclusion that the insurance plan there in issue was not only not purposefully discriminatory, but also had no disparate adverse impact on female employees. As we now show, the same cannot be said of the maternity-leave and disability-pay policies in issue in the present case.

II.

THE EMPLOYMENT POLICIES AT ISSUE IN THIS CASE, UNLIKE THE INSURANCE SCHEME INVOLVED IN GILBERT, HAD A DISPARATE ADVERSE IMPACT ON WOMEN, AND SINCE THEY WERE NOT REQUIRED BY ANY BUSINESS NECESSITY THEY VIOLATED TITLE VII

As the above discussion indicates, a violation of Title VII may be established not only by showing that an employment rule or practice is discriminatory in purpose, but also by showing that it has a disparate adverse effect on minorities or women. We believe both elements are present in this case. However, since respondent's brief has emphasized the intentional discrimination aspects of this case, we see no need to discuss that issue here. Rather, our purpose will be to show that the employment policies in issue in this case —whatever their intent—did have a disparate adverse impact on women, and that petitioner has utterly failed to justify those policies in terms of any business necessity.

A. The Maternity Leave Policy

Let us consider first petitioners' maternity-leave policy. At the time this case first arose, that policy required all pregnant teachers to commence maternity leave no later than the beginning of the seventh month of pregnancy. Subsequently the policy was revised, but even under the revised policy the ultimate power to decide when the teacher must stop working rested with the school administration, rather than with the teacher herself and her physician. Furthermore, if the teacher wanted to work beyond the eighth month, she was required to submit to the indignity of a physical examination by a doctor selected by the administration. And even if that doctor certified that the teacher was able to continue working, the administration could still overrule him and force the teacher to take leave.

That this policy had a disparate impact on women is, we submit, undeniable. By its very terms, it affected women only. There was no similar policy applicable to employees with any other physical impairment or illness. There are, of course, many illnesses—*e.g.,* high blood pressure, diabetes, epilepsy, heart disease, cancer—which may impair a teacher's ability to teach, depending on the nature and severity of the particular case. Yet petitioners had no rule requiring teachers with such illnesses to obtain special permission from the administration to continue working, or requiring such teachers to submit to a mandatory physical examination by someone other than their own physician in order to retain their jobs. So far as appears, a teacher suffering from any such illness would be permitted to decide for himself, with the advice of his physician, whether he is capable of performing his job.

Petitioners suggest that they would require any teacher to submit to a physical examination if circumstances warranted it, since "[e]very employer must be able to act when an employee's work is affected by medical conditions or injuries." (Pet.Br. 44.) But the maternity-leave policy did not call for the intervention of the school administration only in those cases where "an employee's work is affected" by her pregnancy. Rather, the policy applied to *all* pregnant teachers, without regard to whether their work was affected by their pregnancy. For example, at the time plaintiff was directed to take a physical examination, and was denied permission to continue working, there was no indication whatever that her pregnancy was affecting her work.

In short, petitioners imposed much stricter standards and procedures on pregnant teachers desiring to continue working than were imposed on teachers with any other physical condition. The adverse impact which this policy had on female teachers is demonstrated by the facts of this case. Under the policy, plaintiff would have been forced to quit working a full month before her baby was born. It is now quite clear that she was perfectly capable of continuing to work until the very day before delivery. In fact, she *did* work up to that day, by virtue of the preliminary injunction granted by the court below, and there is no evidence that her work suffered in any respect whatsoever. Nor is there any reason to believe that plaintiff's ability to continue working through the ninth month was unique or unusual. As one District Court found in a similar case:

> "In the trial, both parties offered the testimony of highly qualified physicians—obstetricians, gynecologists, hematologists and psychiatrists in support of their respective positions. These witnesses, whether called by the plaintiff or the defendant, indicated that the decision as to when a pregnant women should cease her outside work was an individual one to be made by the physician and the patient. . . . The experts almost entirely agreed that, in most cases, a women could work until the onset of delivery with proper diet, prenatal care and appropriate working conditions." *Newman* v. *Delta Air Lines, Inc.*, 7 FEP Cases 26, 31 (N.D. Ga. December 31, 1973.)

It is thus apparent that, in many cases, the effect of petitioners' policy would be to force pregnant teachers to begin their maternity leave at a time when they are still capable of continuing to work. Unlike the insurance program involved in *Gilbert*, which merely excluded pregnancy from the class of disabilities for which an employee was eligible to receive a monetary benefit while not working, the maternity leave policy in this case tended to deprive pregnant teachers of *employment*. Nothing in *Gilbert* suggests that an employer may treat pregnancy differently than other disabilities in determining whether an employee may remain employed. Surely, for example, an employer cannot adopt a policy of terminating any female employee who becomes pregnant, or of forcing such employees to take leave for the entire period of their pregnancy. While petitioners' policy was not so severe, it nevertheless suffered from the same basic defect as the hypothetical policies cited above—i.e., it imposed restrictions on the employment opportunities of pregnant employees which were not applicable to employees with other disabilities.[3]

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[3] In this respect, the maternity-leave policy at issue here is similar to the seniority policy at issue in *Nashville Gas Co.* v.

Petitioner seeks to justify its policy by citing a dictum in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 647 n.14 (1974), in which the Court noted that one method of determining a pregnant teacher's fitness to teach would be to "require the pregnant teacher to submit to medical examination by a school board physician. . . ." The issue which the Court was addressing in that case, however, was what method of determining a pregnant teacher's fitness to teach would satisfy the requirements of due process. *LaFleur* did not arise under Title VII, and the Court therefore had no occasion to consider or define the standards which would apply under that statute. The issue here, on the other hand, is whether petitioners' maternity-leave policy has the kind of disparate impact on female employees which is prohibited by Title VII. *LaFleur* can provide no guidance whatever on that issue.

As we have shown above, the policy clearly *did* have a disparate impact on female employees. It was therefore petitioners' burden to show that the policy was required by some business necessity. No such showing has been made. Indeed, it is obviously impossible for petitioners to make such a showing, since the California Education Code, § 13456, which governs maternity leaves, was amended as of January 1, 1976 to provide:

Satty, No. 75-536. In that case, the female employee who is placed on maternity leave loses her seniority, and is therefore unable to return to work unless a new vacancy occurs which is not filled by any other employee. Employees on sick leave, on the other hand, retain their seniority, and can exercise their seniority rights to return to work as soon as they are able to do so. On the basis of the reasoning set forth above, we believe this disparate seniority policy also violates Title VII, because it also singles out pregnancy for less favorable treatment than other forms of disability with respect to employment opportunities, and is not justified by any business necessity.

> "The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician."

By virtue of this statute, the maternity leave policy at issue in this case is no longer in effect, and no similar policy may be adopted by any school district in California. It is therefore hardly possible for petitioners to argue that the policy was *required* by any business *necessity*.

In any event, the only conceivable way in which petitioners' policy could be justified would be by proof that pregnant teachers and their physicians cannot be relied upon to make a correct determination as to when such teachers should commence their maternity leaves. Certainly no such proof was presented in this case. Indeed, the notion that the teachers themselves, who are college graduates holding responsible professional positions, cannot be trusted to exercise good judgment in such matters is contrary to all common sense. We submit that no one is better able to make that judgment—or more likely to do it correctly—than the teacher herself, with the advice of her physician. The assumption that teachers are so foolish or irresponsible that their employer must tell them when to stop working is not only unwarranted, it is insulting.[4]

[4] See Brief *Amicus Curiae* filed by the National Education Association and the Women's Equity Action League in *Cleveland Board of Education* v. *LaFleur*, October Term 1972, Nos. 72-777 & 72-1129, in which it was demonstrated that most school maternity policies are rooted in archaic Victorian attitudes toward pregnancy and women. The policy in this case, we believe, derives from these same origins, and reflects the kind of "'romantic paternalism,' which, in practical effect, put women not on a ped-

B. The Paid Sick Leave Policy

Although the paid sick leave issue in this case might appear, at first blush, to be similar to the disability insurance issue in *Gilbert*, we believe it is fundamentally different. As the Court noted in *Gilbert,* it is in the nature of insurance to cover some risks and not others. The Court therefore concluded that the exclusion of pregnancy from the bundle of risks covered by an insurance plan cannot be said to adversely affect women, so long as the risks which *are* covered affect men and women equally.

But paid sick leave is not a form of insurance. Rather, it is an element of an employee's salary. The underlying concept of paid sick leave is that a teacher is hired at an annual salary, which is payable even if the teacher is temporarily absent due to illness or disability, so long as such absences do not exceed a specified number of days per year. In this case, teachers were entitled to 10 days' paid sick leave per year, which could be accumulated from year to year.

This kind of plan cannot be described as "an insurance package, which covers some risks, but excludes others." See *Gilbert,* 97 S.Ct. at 409. Under an insurance scheme, a benefit is payable each time an employee incurs a covered illness or disability, regardless of whether he has received a benefit for some other illness or disability within the same year. But under a sick leave plan of the type involved here, an employee may receive only the amount of paid leave which he has accrued, regardless of how many different illnesses he may suffer. This is because paid sick leave is not in-

estal, but in a cage." *Frontiero* v. *Richardson,* 411 U.S. 677, 684 (1973).

tended to provide "insurance" against specified "risks," but is merely an element of the employee's salary. The concept is that the employee's annual salary includes up to 10 days' sick leave.

The refusal to permit pregnant teachers to draw their accrued sick leave pay therefore constitutes, in effect, a reduction of their salary. It is, in our view, no more justifiable than a reduction in salary of a pregnant teacher who continues working. Surely an employer could not adopt a policy of reducing by a specified amount the salary of any female employee who becomes pregnant, even if he could show that such a policy was not motivated by any intent to discriminate, but merely by a desire to save money. The effect of such a policy would be inherently discriminatory, and it would therefore violate Title VII unless it could be shown to serve some business necessity.

The holding in *Gilbert* that pregnancy can be treated differently than other risks for disability insurance purposes simply cannot be construed to mean that pregnancy can be treated differently for purposes of all other employment rights and benefits, such as the paid sick leave plan involved here. Such an interpretation would mean that an employer could lawfully refuse to hire pregnant women altogether, or pay them lower salaries, or deny them the holidays, vacations or any other benefits which other employees receive, without regard to whether such policies are required by any business necessity. These examples may seem farfetched, but they follow logically from petitioners' contentions in this case.

In order to determine whether the insurance plan in *Gilbert* had an adverse effect on women, the Court

looked to the effect of the benefits which the plan *did* provide, rather than the effect of the exclusion of pregnancy-related disabilities. This approach may have been valid in that case, since insurance by its nature "covers some risks, but excludes others." However, if the same analysis is applied to such matters as paid sick leave, employment opportunities, holidays, vacations, or other employment rights or benefits, an employer could exclude pregnant women from any benefit—indeed, from employment itself—without violating Title VII. It is entirely possible that, even with the exclusion of pregnant women from such benefits, the percentage of females who receive the benefit would be equal to or greater than the percentage of men. Nevertheless, the exclusion of pregnant women would undeniably disadvantage a large class of female employees on the basis of a condition which is unique to their sex. Such a result, in our view, would be totally at war with the policy of the statute, which is designed to insure equal treatment for *all* women. We submit, therefore, that when an employer excludes pregnant females from any employment right or benefit other than disability insurance, such exclusion cannot be justified merely on the basis that the right or benefit at issue is provided equally to all other employees, male and female. Rather, the exclusion itself, because of its adverse impact on female employees, must be justified in terms of a business necessity. And since no such justification was presented for the exclusion of pregnant females from the paid sick leave plan at issue here, that plan must be held to be unlawful under Title VII.[5]

[5] Even if this Court should determine, contrary to the arguments made above, that the sick leave plan involved here is analogous to the insurance plan involved in *Gilbert*, it would not follow that the present plan is lawful. The insurance plan in *Gilbert* was upheld on the basis of evidence showing that the actual benefits provided to women and the costs of those benefits were equal to or greater than the benefits provided to men. 97 S.Ct. at 405 & n.9. There is no similar evidence in this record. To be sure, *Gilbert* suggests that the burden of proving inequality of benefits rests with the plaintiff. But at the time plaintiff moved for and was granted summary judgment in this case she could not have anticipated that such a showing was required, since *Gilbert* had not yet been decided and the lower courts had uniformly held that any disability plan which treats pregnancy differently than other disabilities is a *per se* violation of Title VII. See cases cited in Justice Brennan's dissenting opinion in *Gilbert*, 97 S.Ct. at 413. Thus, even if this Court should now reverse the judgment below on the basis of its decision in *Gilbert*, simple justice would require that the case be remanded to afford respondent an opportunity to prove that the plan involved here, unlike the one in *Gilbert*, did not in fact provide equal benefits to men and women. *See Liss* v. *School District of Ladue*, 14 FEP Cases 771 (8th Cir., February 1, 1977).

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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